

June 20, 2013

**Re: Docket No. TSA-2013-0004, Passenger Screening Using Advanced Imaging Technology**

The National Gay and Lesbian Task Force (Task Force) is pleased to provide the following comments on the above notice of proposed rulemaking (NPRM). The Task Force is the oldest national lesbian, gay, bisexual, and transgender (LGBT) civil rights organization. Founded in 1973, the Task Force builds political power from the grassroots up by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of our movement. We are pleased to have the opportunity to comment on the proposed rules promulgated by the Transportation Security Administration (TSA) regarding the use of Advanced Imaging Technology at airport security screening checkpoints. Of particular concern to us is the impact this rule could have on the transgender community and other vulnerable populations.

While we appreciate the steps TSA has made to address concerns from the LGBT community, these concerns cannot fully be resolved within the agency's current approach to screening. The NPRM is fatally flawed, nonresponsive to the concerns identified by the Court of Appeals, and especially problematic for vulnerable traveler populations such as transgender people. It is merely a rubber stamp of unlimited authority to use privacy-invasive screening techniques. We are deeply troubled that TSA's cost-benefit analysis completely ignores real passenger privacy interests that are impacted by the proposed regulatory approach, and that the NPRM proposes neither any change in current policy nor even to codify the minimal passenger protections in current agency practice. We urge your agency to conduct a new cost-benefit analysis that fully considers the ways in which, notwithstanding existing mitigation measures, passenger privacy is in fact impacted by the current screening approach. We further urge you to adopt proposed regulatory alternative #3 (walk-through metal detectors supplemented with explosive trace detection) or, alternatively, to consider additional regulatory alternatives to reduce reliance on body scanners and prison-style pat-downs. Finally, to the extent that the final rule incorporates *any* use of body scanners and/or prison-style pat-downs, it must at a bare minimum codify protections for passengers that are already part of TSA practice.

There can be no doubt that TSA has a public trust problem, that the existing airport screening approach does impact traveler privacy, and that it disparately impacts transgender travelers among other traveler groups. We urge you in the strongest possible terms to issue a fair and well-considered final rule that provides more than a rubber stamp.

### **Transgender Travelers Are Disparately Affected by TSA's Invasive Screening Approach**

An estimated nearly 700,000 adults in the United States, or 0.3% of the adult U.S. population, are transgender.<sup>1</sup> While estimates of the population of transgender children and adolescents are lacking, this population is also significant. In a national survey conducted in 2008-09, more than one in five transgender adults reported having been harassed or disrespected at the airport.<sup>2</sup> Since the implementation of the current regime of routine scanning and pat-downs, LGBT organizations have continued to be contacted with stories of harassment, rudeness, being singled out for additional screening, and other potentially discriminatory treatment of transgender children and

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<sup>1</sup> G. Gates, *How Many People Are Lesbian, Gay, Bisexual and Transgender?*, WILLIAMS INST. ON SEXUAL ORIENTATION LAW, UCLA (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

<sup>2</sup> J.M. GRANT, L.A. MOTTET, J. TANIS, J. HARRISON, J.L. HERMAN, M. KEISLING, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, 130 (2011).

adults and their loved ones. In addition, LGBT organizations continues to hear from many travelers that they are afraid of going to the airport, uncertain of how they will be impacted by current screening techniques or treated by TSOs, and in some cases are unwilling to fly as a result.

While we recognize and appreciate the modest steps TSA has taken to improve screening procedures, staff training, and traveler education with regard to this population, transgender people will always be disparately impacted by any system based on routine scrutiny of the contours of passengers' bodies under their clothes, whether by body scanners, prison-style pat-downs, or the current combination of both. Transgender people's unique bodily sensitivities, common use of sensitive prosthetics, high rates of past physical and sexual trauma, and pervasive experiences of harassment and other discrimination in all areas of social life make the routine use of even modified scanners, when paired with intensive pat-downs as the only alternative option or form of resolution, a very serious imposition on individual privacy, comfort, and well-being.

### **TSA's Cost-Benefit Analysis Completely Ignores Passenger Privacy Interests**

The ruling of the Court of Appeals directing the agency to undertake this rulemaking was premised on a simple conclusion: "Despite the precautions taken by the TSA, it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not."<sup>3</sup> Yet the NPRM and accompanying Initial Regulatory Impact Analysis fail to acknowledge any impact whatsoever on the privacy of the traveling public. Instead, the IRIA merely states that the privacy protections noted by the Court of Appeals, together with the Congressional ATR mandate, have "adequately addressed privacy concerns."<sup>4</sup>

Yet while these steps are laudable, they are not reflected in the actual rule TSA has proposed. Nor do these measures eliminate all privacy impacts on the public. Even with most of these measures in place, the ruling of the Court of Appeals was premised on a real privacy impact from body scanners. While the ATR mandate is a positive step, it also does not eliminate all privacy impacts. The agency tacitly admits as much by stating in its Initial Regulatory Impact Statement that it "anticipates future advancements to AIT in ... privacy protection" and by stating that its proposed regulatory approach has the "Potential for negative public perception on... privacy concerns."<sup>5</sup> Indeed, as the Congressional Research Service has noted, respondents in a 2010 survey identified privacy more than twice as often as delay as a primary concern with AIT.<sup>6</sup>

First and most importantly, the use of body scanners as a primary screening method is inseparable from the use of highly intrusive physical pat-downs. These screening techniques are inextricable because (1) TSA relies on the alternative option of pat-downs to mitigate the privacy impact of the scanners themselves, and (2) TSA relies on the use of pat-downs to resolve many, if not most, anomalies identified by ATR. While TSA regularly cites the high rate at which passengers opt for scanning over pat-downs, this rate demonstrates not that passengers view scanners as non-intrusive, but rather that many view the alternative of a prison-style pat-down

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<sup>3</sup> EPIC v. DHS, 653 F.3d 1, 6 (D.C. Cir. 2011).

<sup>4</sup> IRIA at 101.

<sup>5</sup> IRIA at 110, 119.

<sup>6</sup> U.S. Congressional Research Service. Airport Body Scanners: The Role of Advanced Imaging Technology in Airline Passenger Screening (7-5700; September 12, 2012), by Bart Elias (citing George Dooley, "Travel Leaders Study: Consumers OK with Airport Security," *Travel Agent Central*, April 8, 2010, available at <http://www.travelagentcentral.com/airline-policies/travel-leaders-study-consumers-ok-airport-security-20779>).

as *even more intrusive*.<sup>7</sup> Others may not even realize they have the option to opt out. Accordingly, pat-downs and notice are essential parts of the operation of body scanners, and the privacy impacts of the use of pat-downs in conjunction with body scanners must be assessed in this rulemaking. Additionally, ATR does not eliminate the privacy impact of body scanners themselves. Even with this software, scanners generate and analyze data representing the contours of passengers' bodies underneath their clothing, and use this data to highlight areas of passengers' bodies that may then be subject to a pat-down.

For these reasons, an adequate regulatory impact analysis would not only identify measures the agency has taken to mitigate privacy concerns, but would also identify remaining privacy impacts on passengers, estimate the total privacy impact, and weigh this impact alongside the other costs and benefits of the proposed regulatory action. Other agencies routinely include privacy impacts on the public in their analysis of regulatory costs, and it is unacceptable for the agency not to do so in the case of a program impacting millions of members of the traveling public.

### **TSA Should Adopt Regulatory Alternative #3 or Consider Additional Regulatory Alternatives that Reduce Reliance on Body Scanners and Prison-Style Pat-Downs**

We strongly urge the Department to adopt proposed regulatory alternative #3 as described in the NPRM (walk-through metal detectors supplemented with explosive trace detection) or, alternatively, to consider additional regulatory alternatives that reduce reliance on body scanners as a primary method of checkpoint screening. Because of the intrusive, time-consuming, costly, and controversial nature of body scanners, as well as persistent questions about their efficacy in avoiding false positives and detecting the most significant threats, body scanners are not appropriate for use as a primary method of checkpoint screening.

We note that while the NPRM oddly describes the proposed regulatory alternatives in all-or-nothing terms, TSA's historical practice has been to use a mix of screening methods providing a layered approach and a certain amount of variability. Accordingly, we expect that TSA's actual regulatory alternatives to include using both body scanners and pat-downs on a more limited basis to supplement the use of metal detectors and explosive trace detection. Curiously, the NPRM completely ignores the possibility of redeploying already-purchased scanner devices on a more limited basis, such as for random or secondary screening. Given the intrusive, time-consuming, and controversial nature of body scanners, they would be more appropriate for these more limited uses than as a primary screening method.

### **The Final Rule Must, at a Bare Minimum, Codify Existing Passenger Protections**

Despite the significant privacy implications noted by the Court of Appeals, the proposed rule does not incorporate *any* limitation on the use of body scanners or pat-downs – not even the minimal requirements already incorporated in TSA policy and practice or mandated by Congress. If TSA ultimately chooses to maintain use of the body scanners, the final rule must, at a bare minimum, incorporate these existing protections. Because public trust is fundamental to the viability of airport screening, these protections must be codified in regulation as opposed to less formal operating procedures that are less transparent and more readily modified. These include at least the following:

1. No human viewing of individual passenger images

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<sup>7</sup> See *DHS v. EPIC*, 653 F.3d 1, 10 (D.C. Cir. 2011) (pat-down alternative “allows [the traveler] to decide which of the two options ... is *least* invasive” (emphasis added)).



2. No retention of individual passenger image data
3. Providing passengers an alternative to scanners
4. Providing adequate notice of alternatives
5. All physical searches to be conducted by officers of the same self-identified gender
6. All secondary screening to be conducted in private at passenger's election and with a witness of passenger's choice
7. No passenger required to expose sensitive areas under clothing to reveal prostheses, medical devices, or other items
8. Physical searches to resolve an anomaly detected by scanning to be no more intrusive than necessary to resolve the anomaly
9. Training for TSOs to include working with diverse traveler populations
10. Nondiscrimination on the basis of race, color, national origin, sex, religion, age, disability, genetic information, sexual orientation, parental status, or gender identity

### *1. Automated Target Recognition Mandate*

Congress has mandated that all body scanners employ ATR software, and it would be irrational for the final rule to authorize the use of scanners without this fundamental requirement. If they are to be used, the final rule must define scanners not only as technology that allows screening without physical contact, but also as technology that allows screening without human viewing of individuals passenger images.

### *2. No Retention of Individual Passenger Image Data*

TSA has stated that, with the use of ATR, individual passenger image data is neither viewed nor retained. The assurance that such data are not retained was central to the reasoning of the Court of Appeals in *EPIC v. DHS*.<sup>8</sup> Nevertheless, many passengers reasonably fear that their individual body image could be retained and viewed at a later time. If ATR is to be used, the final rule should define scanners as technology that allows screening without subsequent retention of individual passenger image data.

### *3. Alternatives for Passengers*

As previously stated, the provision of prison-style pat-downs as an alternative to body scanners is grossly inadequate because many travelers experience these pat-downs as *even more invasive* than scanners. The proposed rule omits even this inadequate requirement.

### *4. Adequate Notice of Alternatives*

Regardless of the alternative provided to the scanners, it must be well-publicized by the TSA. As shown in Table 1 and Table 2 of the NPRM, the number of passengers opting out of scanners has grown drastically since 2008 and will continue to grow into the future as more passengers realize this technology is optional. TSA's current practice of listing the scanner as optional in small print on an 11" x 14" poster in a crowded checkpoint where passengers are rushed to load their belongings into bins is far from adequate to gain the informed consent needed to make the alternative process meaningful. The "high level of acceptance" of the scanners cited in the NPRM is rather evidence of the inadequate notice of alternatives currently provided. As the Court of Appeals

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<sup>8</sup> 653 F.3d 1, 4, 10.



noted, “Many passengers . . . remain unaware of this right [to opt out].<sup>9</sup> The final rule must include an agency commitment to providing meaningful and adequate notice of scanner alternatives, if scanners are to be used in a routine fashion.

#### *5. Physical Searches Conducted by Officers of Same Self-Identified Gender*

The current use of body scanners is inseparable from the use of thorough physical pat-downs as an alternative as well as secondary screening measure. TSA’s deployment of scanners cannot work without the use of pat-downs as a secondary method, and TSA’s justification for use of scanners hinges on the use of pat-downs as an alternative. The inextricable link between these two, tandem checkpoint screening methods is underscored by the panel opinion of the Court of Appeals, which emphasized the importance of the pat-down alternative in mitigating the personal intrusion caused by the scanners.<sup>10</sup>

Accordingly, if TSA is to codify use of scanners it must also codify basic protections for the use of pat-downs. Among the most basic, minimal protections is TSA’s long-standing requirement that, absent exigent circumstances, all pat-down searches be conducted by officers of the same self-identified gender as the traveler (rather than the gender listed on identification or the gender an officer assumes the traveler was assigned at birth). This is a fundamental expectation of the traveling public and must be reflected in the final rule.

#### *6. Physical Searches Conducted in Private and with Chosen Witness at Passenger’s Election*

Among the minimal protections long provided by TSA is that physical searches and other secondary screening be, at the passenger’s election, conducted in a private location and with a witness of the passenger’s choosing. This is also a basic expectation of passengers that must be reflected in the final rule.

#### *7. Limitation on Requirement to Lift or Remove Clothing*

Another key protection currently established in agency policy, which must appear in any final rule authorizing body scanners, is a minimal zone of privacy protection for travelers with personal medical devices or prostheses or other items under clothing that must be identified during screening. This includes not requiring passengers to lift or remove clothing in sensitive areas to reveal a prosthetic or medical device or any other item, and instead allowing travelers, when necessary, to conduct a self pat-down of the item, followed by an explosive trace detection sampling of the hands. In the context of the routine, invasive pat-downs on which the current screening approach depends, not to codify this minimal limitation would be shocking. If TSA is to authorize the use of intrusive routine pat-downs and body scanners, this fundamental protection must be included in any final rule.

#### *8. Additional Limits on “Resolution” Pat-Downs*

In addition, current TSA policy provides for “resolution” pat-downs to be limited in appropriate cases to only those areas of the body where an anomaly was detected by a body scan. If a body scan has identified an anomaly only in the area of a passenger’s head or arm, for example, it is simple common sense that further screening limited only to that area will be sufficient in most cases to resolve the anomaly. If no threat object is identified in area highlighted by the scanner, any further physical screening is an unnecessary invasion of

<sup>9</sup> DHS v. EPIC, 653 F.3d at 3.

<sup>10</sup> 653 F.3d 1, 3, 10.

privacy and a waste of time. Any final rule that authorizes body scanners must codify a requirement that “resolution” pat-downs be limited to the area of an anomaly wherever possible.

#### *9. Comprehensive Training for TSOs including Working with Diverse Passenger Populations*

TSA has publicly committed to substantially expanding training for TSOs, including training on working with diverse passenger populations, many of which are disparately or uniquely impacted by aspects of TSA’s current screening techniques – such as transgender and gender non-conforming people, people with disabilities, religious minorities, older travelers, and families with children. Robust training on these topics is essential to public trust in the screening process, and should be explicitly required by any final rule.

#### *10. Traveler Civil Rights Policy*

TSA’s Traveler Civil Rights Policy should also be codified in any final rule and should be expanded to include nondiscrimination on the basis of gender identity. Again, this goes to public trust in the screening process.

### **The Final Rule Must Use Clearly Defined Terms**

In addition to completely lacking passenger protections, the proposed rule uses vague, confusing terms that fail to adequately define the agency’s authority for the use of body scanning technology, or to give sufficient notice to the public of the technologies’ purpose or impact on travelers.

Most notably, the proposed rule authorizes the use of “screening technology used to detect concealed anomalies” without providing any definition or context for the vague term “anomalies.” As commonly defined, an anomaly is “something different, abnormal, peculiar, or not easily classified.”<sup>11</sup> This extremely broad and amorphous term could potentially incorporate not only foreign objects that could be put to a potentially dangerous use in an aviation environment, but absolutely any item, garment, or even features of the traveler’s own body that are deemed to be unusual in any way. The use of this vague, undefined term fails to establish appropriate objectives and limits for security screening and invites abuse and could disproportionately affect the transgender community. Checkpoint screening should be expressly limited to the detection of prohibited foreign items that pose special risks of creating physical danger in the aviation environment. While current scanner technology may not treat unusual bodily characteristics as anomalies, TSA has been unable or unwilling to publicly confirm this. Codifying the limits of screening objectives in this way is essential to public trust.

### **Conclusion**

We recognize the difficult job that TSA faces in protecting the nation’s transportation systems and, most importantly, its travelers. We strongly believe that TSA can fulfill its security mission while respecting the rights and dignity of all passengers, and we look forward to continued dialogue and collaboration with your agency.

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<sup>11</sup> Merriam-Webster’s Dictionary, <http://www.merriam-webster.com/dictionary/anomaly>.